

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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May 26, 2011

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**RE: Jean Vareha, et. al. V. Beebe Medical Center, Inc., et. al.
S10C-04-021-ESB
Letter Opinion**

Date Submitted: February 23, 2011

Dear Counsel:

This is my decision on (1) the Motion for Review of Affidavit of Merit filed by defendants Dale F. Sutherland, M.D., Sherif R. Gobran, M.D., and Delaware Anesthesia Associates, P.A., and (2) the Motion for Review of Affidavit of Merit filed by defendant Beebe Medical Center, Inc. This is a medical negligence case involving the alleged improper extubation of John Vareha, a patient at Beebe's hospital in Lewes, Delaware. Vareha had undergone a number of diagnostic tests and surgical procedures and was intubated in the critical care unit. He was then extubated by a physician's assistant on the

advice of Sherif R. Gobran, M.D., an anesthesiologist who happened to be in the critical care unit at the time. Vareha died shortly after he was extubated. Vareha's wife and daughters filed a medical negligence complaint against the defendants alleging that he was improperly extubated. They filed an Affidavit of Merit with their complaint. The Affidavit of Merit was signed by a doctor who practices internal and pulmonary medicine. However, the complaint initially named the wrong anesthesiologist involved in Vareha's extubation. The Plaintiffs amended their complaint to correct this by naming Dr. Gobran. They also added several new allegations against Dr. Gobran, but they did not file a new Affidavit of Merit with their amended complaint. The Beebe employees involved in Vareha's care are a registered nurse and two physician's assistants. Dr. Gobran argues that the Affidavit of Merit is defective because (1) it did not name him personally, (2) it did not address the additional allegations against him that were raised for the first time in the amended complaint, and (3) the Plaintiffs' medical expert does not practice in the same or similar field of medicine as he does. Beebe argues that the Affidavit of Merit is defective because the Plaintiffs' expert is not qualified to give an opinion on the standard of care applicable to a registered nurse and a physician's assistant. I have concluded that the Affidavit of Merit is adequate. As to Dr. Gobran's arguments, it does address the substantive allegations of negligence by the anesthesiologist actually involved in the extubation of Vareha even though it does not name Dr. Gobran personally. The statute setting forth the requirements for an Affidavit of Merit does not require a new Affidavit of Merit to be filed each time the complaint is amended to add new allegations. The critical issues in this case involve the extubation of Vareha and his respiratory care afterwards. The Plaintiffs' expert, as a pulmonologist, is qualified to offer an opinion as to the standard of care regarding

extubation and respiratory care. As to Beebe's argument, the Plaintiffs' expert, as a pulmonologist, is qualified to testify as to the applicable standard of care regarding a registered nurse and physician's assistant who are involved in the extubation of a patient and his respiratory care.

BACKGROUND

John Vareha was admitted to the Beebe Medical Center complaining of chest pain and shortness of breath on June 4, 2008. He suffered from chronic obstructive pulmonary disease and coronary artery disease and had previously undergone a stent placement. Vareha underwent a coronary angiography the next day and quadruple bypass the day after that. Dr. Gobran was the attending anesthesiologist for Vareha's bypass surgery. Vareha developed a postoperative small bowel obstruction after the bypass surgery. A surgeon performed an exploratory laparotomy and lysis of adhesions on Vareha on June 11, 2008. Dr. Sutherland was the attending anesthesiologist for these procedures. Vareha remained intubated after the surgery and was transferred to the critical care unit and given varying amounts of Dilaudid throughout the evening. Vareha was cared for by Beebe employees Kelly Zakszeski, P.A.C., Casey Kennedy, R.N., and Brian McCarthy, P.A. while he was in the critical care unit. Dr. Gobran was in the critical care unit when he was informally consulted by Zakszeski about whether Vareha should be extubated at that time. Dr. Gobran agreed that Vareha should be extubated. He was extubated later that evening without weaning parameters by Zakszeski. After Vareha was extubated his oxygen level continuously dropped throughout the night. Shortly before midnight Vareha's oxygen level had dropped to approximately 70% and he was vomiting a large quantity of green fluid. He was emergently intubated, but he became brachycadic and asystole. Beebe personnel

administered advanced life support to Vareha, but he never regained consciousness and was pronounced dead at 00:53 hours on June 12, 2008.

Jean Vareha, Vareha's widow, and her two daughters filed a medical negligence action against Beebe Medical Center, Inc., Dale R. Sutherland, M.D., and Delaware Anesthesia Associates P.A.¹ The Plaintiffs believed initially that it was Dr. Sutherland who told Zakszeski that it was appropriate to extubate Vareha. However, after some preliminary discovery it became clear that it was Dr. Gobran and not Dr. Sutherland who advised Zakszeski. The Plaintiffs then filed an amended complaint adding Dr. Gobran as a defendant. They modified paragraph 33 of the original complaint, which then became paragraph 34 of the amended complaint, by deleting Dr. Sutherland and adding Dr. Gobran, and adding four new subparagraphs in addition to those original subparagraphs and modifying one of the original subparagraphs by adding additional allegations to it. The Plaintiffs did not file a new Affidavit of Merit with the amended complaint.

The Plaintiffs allege that Dr. Gobran participated in the premature extubation of Vareha, failed to obtain weaning parameters prior to the extubation, participated in the extubation of a compromised patient in the evening hours when adequate professional staffing was unavailable should an emergency occur, failed to consult with a respiratory therapist prior to extubation, failed to review Vareha's chart, and failed to document the reasons for his decision to extubate Vareha. The Plaintiffs allege that Beebe's critical care unit personnel improperly extubated Vareha, failed to adequately monitor Vareha's respiratory status following extubation, failed to provide adequate oxygenation to Vareha

¹ The Plaintiffs' original complaint included two other medical doctors as defendants, but they have since been dismissed from the case.

following extubation, failed to act promptly and appropriately in response to Vareha's deteriorating vital signs, and administered excessive amounts of Dilaudid to Vareha.²

The Plaintiffs submitted an Affidavit of Merit signed by a medical expert.³ His curriculum vitae was also attached. The Plaintiffs' medical expert is board certified in internal medicine and pulmonology. Dr. Gobran is board certified in cardiac anesthesiology. The employees of Beebe Medical Center who treated Vareha are either a nurse or a physician's assistant. Given the broad range of medical disciplines involved I asked the parties to answer whether or not the Plaintiffs' medical expert is qualified under 18 *Del.C.* 6853(c) to address:

(1) The alleged breaches by Beebe Medical Center, Inc. of the standard of care as set forth in paragraph 32 of the complaint, which breaches were allegedly caused by Beebe's employees, Kelly Zakszeski, P.A.C., C. Kennedy, R.N., and B. McCarthy, P.A.

(2) The alleged breaches of the standard of care by Dale Sutherland, M.D., Sherif R. Gobran, M.D., and Delaware Anesthesia Associates, P.A.

The parties also addressed the issues regarding the substitution of Dr. Gobran for Dr. Sutherland.

Dr. Gobran argues that the Affidavit of Merit is defective because (1) it did not name him personally, (2) it did not address the additional allegations against him that were raised for the first time in the amended complaint, and (3) the Plaintiffs' medical expert does not practice in the same or similar field of medicine as he does. Beebe argues that the

² Dilaudid is the trade name of Hydromorphone, a narcotic drug used to relieve the pain associated with dry coughing.

³ The Plaintiffs originally submitted two Affidavits of Merit, but one of them was only applicable to one of the medical doctors who has since been dismissed from the case.

Plaintiffs' medical expert is not qualified to offer an opinion on the standard of care applicable to a registered nurse and a physician's assistant.

DISCUSSION

_____ No healthcare negligence lawsuit can be filed in Delaware unless the complaint is accompanied by an affidavit of merit that meets certain requirements and is signed by a qualified medical expert. The specific requirements for an Affidavit of Merit are set forth in 18 *Del.C.* § 6853(a)(1) and (c) and § 6854. Section 6853(a)(1) states, in part, that:

No healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by an affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant.

18 *Del.C.* § 6853(c) states that:

The affidavit(s) of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant(s) and that the breach was a proximate cause of injury(ies) claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant(s) is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

18 *Del.C.* § 6854 states that:

No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.

An Affidavit of Merit is a preliminary hurdle intended for the early stages of a medical

negligence lawsuit, one purpose of which is to screen out frivolous claims.⁴ The requirements for an Affidavit of Merit are minimal.⁵ The fact that a physician is qualified to provide an affidavit under § 6853(c) prior to discovery by the opposing party does not automatically qualify the physician to offer an opinion regarding the standard of care at trial.⁶

Dr. Gobran

1. No New Affidavit of Merit

Dr. Gobran argues that the Affidavit of Merit is defective because it does not name him personally. The Plaintiffs' original complaint named Dr. Sutherland, but not Dr. Gobran, as the doctor involved with the allegedly improper extubation of Vareha. The Affidavit of Merit that was filed with the complaint stated, in part, that there are reasonable grounds to believe that the applicable standard of care was breached by Dale F. Sutherland, M.D. This was because the Plaintiffs believed at the time that Dr. Sutherland was involved in the extubation of Vareha. When Dr. Sutherland's deposition was taken it became clear that it was Dr. Gobran who was involved in the extubation of Vareha and not Dr. Sutherland. The Plaintiffs then amended their complaint to add Dr. Gobran.

____ Dr. Gobran argues that Section 6853 required the Plaintiffs to file a new Affidavit of Merit directed to him with the amended complaint and that failure to do so is a fatal error,

⁴ *Dougherty v. Horizon House, Inc.*, 2008 WL 3488532, at *3 (Del. Super. June 25, 2008).

⁵ *Wilson v. James*, 2010 WL 1107787, at * 2 (Del. Super. Feb. 19, 2010), and *Green v. Weiner*, 766 A.2d 492, 495-496 (Del. 2001).

⁶ *Wilson*, 2010 WL 1107787, at *2.

warranting his dismissal from the case. The Plaintiffs argue that the amended complaint does nothing more than substitute Dr. Gobran for Dr. Sutherland and since the Affidavit of Merit addresses the allegations of negligence that are now properly attributed to Dr. Gobran that Section 6853 has been complied with.

I have concluded that the Plaintiffs did not have to submit a new Affidavit of Merit simply because they substituted Dr. Gobran for Dr. Sutherland. Section 6853 does require an Affidavit of Merit to be attached to the complaint for each defendant. The Affidavit of Merit has to state that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant. It also has to state that it is the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant and that the breach was a proximate cause of the injuries claimed in the complaint. The Plaintiffs' Affidavit of Merit does meet these requirements. While it does not name Dr. Gobran personally, it does address his actions as the medical doctor who was involved in the extubation of Vareha. This is enough and it satisfies the purpose of Section 6853, which is to weed out frivolous claims. To require the Plaintiffs to submit a new Affidavit of Merit where they have only substituted one doctor for another would not further the purpose of Section 6853 where the allegations of medical negligence against the doctor are essentially the same.

2. Additional Allegations in the Amended Complaint

Dr. Gobran argues that the Affidavit of Merit is defective because it does not address the additional allegations that were raised against him for the first time in the amended complaint. The amended complaint, in addition to substituting Dr. Gobran for Dr. Sutherland, does raise some additional allegations of negligence against Dr. Gobran

that were not raised against Dr. Sutherland. However, Section 6853 does not require the Affidavit of Merit to specifically address every allegation against a defendant. Section 6853(a)(1) provides that no healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by an Affidavit of Merit stating that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant. Section 6853(c) states that the affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. These requirements are simply not as stringent as Dr. Gobran argues that they are. There are basically two requirements that the Plaintiffs had to meet. One, the Plaintiffs had to file an Affidavit of Merit with their complaint. The Plaintiffs did do this. However, Section 6853 does not require, as Dr. Gobran argues, that a new Affidavit of Merit has to be filed each time there is an amendment to the complaint adding additional allegations against a defendant. Two, the Plaintiffs had to file an Affidavit of Merit stating that there are reasonable grounds to believe that the applicable standard of care was breached by the defendant and that the breach was a proximate cause of the injuries alleged in the complaint. The Plaintiffs allege in their amended complaint that Dr. Gobran's failure to properly extubate Vareha caused his death. The Plaintiffs' Affidavit of Merit states that the applicable standard of care was breached by the doctor who extubated Vareha and that the breach proximately caused Vareha's death. Thus, the Plaintiffs have met both of Section 6853(c)'s requirements.

3. Same or Similar Field

_____Dr. Gobran argues that the Affidavit of Merit is defective because the Plaintiffs' medical expert does not practice in the "same or similar" field of medicine that he does. Section 6853(c) addresses the qualifications of the expert who signs an Affidavit of Merit. It requires that the expert must have been engaged in the "same or similar field of medicine" as the defendant and be board certified in the "same or similar field of medicine" as the defendant if the defendant is board certified. Dr. Gobran is a cardiothoracic anesthesiologist and is board certified in that area. The Plaintiffs' medical expert practices internal and pulmonary medicine and is board certified in those areas. An anesthesiologist is a physician who specializes in anesthesiology, the branch of medicine involving the use of drugs that cause insensibility to pain. Pulmonology is a specialty that deals with diseases of the lungs and respiratory treatment. It is generally considered to be a branch of internal medicine, although it is closely related to intensive care medicine when dealing with patients requiring mechanical ventilation. Dr. Gobran described his speciality as "airway management." Dr. Sutherland stated during his deposition that an operating room anesthesiologist has no role in extubation decisions once a patient is transferred to the critical care unit.

This case involves the extubation of Vareha and the respiratory complications that arose after he underwent bowel surgery. As such, the allegations against Dr. Gobran are not related to his work as the attending anesthesiologist during Vareha's bypass surgery. Instead, the allegations against Dr. Gobran relate to the "curbside consultation" that he gave to Zakszeski before her extubation of Vareha while Dr. Gobran was in the critical care unit. The Plaintiffs argue that this is a matter of respiratory function and that Dr. Gobran

went outside of his area of expertise and stepped into another specialist's area of expertise. The Plaintiffs also argue that their medical expert is qualified to offer an opinion as to the appropriate standard of care in this area. I agree. This case is more about pulmonary function and respiratory care than anesthesiology. The Plaintiffs' medical expert, as a board certified pulmonologist, is certainly qualified to offer an opinion on the applicable standard of care regarding extubation and the respiratory care that Vareha needed afterwards. Moreover, as the Plaintiffs point out, it is well-established that the practice of medicine is not discrete and that the diagnosis and treatment of some medical problems may be of concern to doctors of different specialties and that a common standard of care may be shared among those doctors of different specialties.⁷ In this case both Dr. Gobran and the Plaintiff's medical expert claim to have expertise in "airway management" and "respiratory function." That may well be the case. In any event, I am satisfied that there was one standard of care for the extubation of Vareha and his respiratory treatment afterwards and that the Plaintiffs' expert is qualified, at this stage of the proceedings, to offer an opinion on that standard of care.

Beebe

Beebe argues that the Plaintiffs' medical expert is not qualified to offer an opinion on the standard of care applicable to its critical care personnel. Zakszeski and McCarthy are physician's assistants who work in cardiovascular surgery. A physician's assistant is a mid-level medical practitioner who works under the supervision of a licensed doctor.

⁷ *Smith v. First Correctional Medical, LLC*, 2005 WL 2090700 (Del. Super. March 30, 2005), *Balen v. Horner*, 706 A.2d 518 (Del. 1998), and *Carrow v. Dressler*, 2008 WL 100840 (Del. Super. Jan. 9, 2008).

Kennedy is a registered nurse. A registered nurse is a person who has graduated from an accredited nursing program and passed the required state examination for licensure and registration. These Beebe employees were treating Vareha in the critical care unit after he underwent coronary bypass and bowel surgery. This case involves the extubation of Vareha and the respiratory complications that arose after he underwent bowl surgery. Extubation involves the removal of a tube after intubation from the larynx or trachea. As such, this case focuses on the standard of care regarding the proper way to extubate a patient and care for his respiratory function afterwards. It is well-established that a physician may offer an opinion as to the standard of care as to a non-physician, such as a physician's assistant, nurse-midwife, or a nurse, provided that the physician is familiar with the degree of skill ordinarily employed by a practitioner of the type about which he or she will be offering an opinion.⁸ I have concluded that, given the nature of the issues involved, the minimal requirements for an Affidavit of Merit, the Plaintiffs' medical expert's training and experience, that he is qualified, under § 6853(a)(1) and (c), as an expert to offer an Affidavit of Merit addressing the alleged negligence of Beebe and its critical care employees.

The Plaintiff's medical expert is board certified in internal medicine and pulmonary medicine. He performed a fellowship in pulmonary and critical care medicine from 1981 through 1983. He became board certified in pulmonary medicine in 1992 and was re-certified in 2003. In 1993, he completed a fellowship with the American College of Chest

⁸ *Sturgis v. Bayside Health Association Chartered*, 942 A.2d 579 (Del. 2007), *Simmons v. Bayhealth Medical Center, Inc.*, 950 A.2d 659, 2008 WL 2059891 (Del. May 15, 2008) (TABLE), and *Wilson*, 2010 WL 1107787, at *2.

Physicians. He has almost 30 years experience practicing in these areas. I am satisfied that, given the Plaintiffs' medical expert's long history of practicing pulmonary medicine, he is qualified as an expert to offer an opinion, at this preliminary stage of the proceedings, concerning the extubation of Vareha and the treatment of his respiratory complications by Beebe and its critical care employees.

CONCLUSION

The Affidavit of Merit filed by the Plaintiffs meets all of the statutory requirements.

IT IS SO ORDERED.

Sincerely,

/S/ E. Scott Bradley

E. Scott Bradley

cc: Prothonotary's Office